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No. 91-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Mark Joseph Sholtis,

Petitioner

v.

State of New Jersey,

Respondent

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state statute that mandates the forfeiture of a firearm after criminal charges are dismissed, without providing the owner of the firearm adequate notice or an opportunity for an evidentiary hearing, violates the Due Process Clause of the Fourteenth Amendment?

PARTIES

The real parties in interest in this case are Mark Joseph Sholtis, the owner of the two firearms seized by the State of New Jersey, and the State of New Jersey.

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IN THE MATTER OF TWO SEIZED FIREARMS

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the New Jersey Supreme Court (App. A) is reported officially at 127 N.J. 84 (1992) and unofficially at 602 A.2d 728 (N.J. 1992).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on March 4, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, U.S. Constitution

". . . nor shall any State deprive any person of . . . property, without due process of law . . . ."

STATUTES INVOLVED

N.J.S. 2C:64-1. Property subject to forfeiture

a. Any interest in the following shall be subject to forfeiture and no property right shall exist in them:

(1) . . . firearms which are unlawfully possessed, carried, acquired or used, ... These shall be designated prima facie contraband.

N.J.S. 2C:64-2. Forfeiture procedures; prima facie contraband

Except as provided in N.J.S. 2C:35-21, prima facie contraband shall be retained by the State until entry of judgment or dismissal of the criminal proceeding, if any, arising out of the seizure. Thereafter, prima facie contraband shall be forfeited to the entity funding the prosecuting agency involved . . . .

STATEMENT OF THE CASE

This case concerns two firearms seized from Mark Joseph Sholtis on August 9, 1988. On that date, Mr. Sholtis, a resident of Florida, was stopped for speeding while driving a 1977 Dodge Van with Florida registration on the New Jersey Turnpike in Teaneck, New Jersey by New Jersey state troopers. App. at 2a. When one of the troopers approached the vehicle, he observed two occupants in the front seat: the driver, Mr. Sholtis, and a passenger, Bonnie Gerla. While speaking with these individuals, according to the State, the trooper allegedly spotted an 18 inch machete lying in open view between the driver's and passenger's seats. App. at 2a. According to Mr. Sholtis, however, and as noted by the trial court in a hearing on September 13, 1988 (App. at 9a), after the trooper was given Mr. Sholtis' driver's license and vehicle registration, the trooper, without reading Mr. Sholtis' his rights, asked if there were any firearms in the vehicle.[1] Mr. Sholtis answered in the affirmative. As a

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[1] In its opinion, the New Jersey Supreme Court stated that the parties "have agreed on the facts." 127 N.J. at 86, 602 A.2d at 729. App. at 2a. In fact, although the parties agreed on the procedural history of the case, their briefs made it evident that, regarding the above recited critical facts related to the search of the van, there was a significant dispute.

result of the trooper's observation, or as a result of Mr. Sholtis' statement, the trooper directed both occupants from the van, read them their rights, patted them down for weapons with negative results, and placed them under arrest for possession of a dangerous weapon (the machete). App. at 2a.

The trooper then searched the interior of the van without a warrant. Inside the glove compartment, he found a loaded .38 caliber Smith and Wesson handgun. App. at 2a. Underneath and behind the driver's seat he discovered a loaded .357 caliber Smith and Wesson handgun, as well as a "speed loader" containing five .38 caliber hollow point cartridges, five .38 caliber blue-tipped cartridges, and a clear plastic baggie containing a small amount of marijuana. App. at 2a.

Mr. Sholtis and Ms. Gerla, both of whom were Florida residents, were transported to the Totowa, New Jersey State Police Barracks where Mr. Sholtis gave a written statement admitting to ownership of both the firearms and the cartridges found in the van. Ms. Gerla gave a written statement acknowledging ownership of the marijuana. App. at 2a. Mr. Sholtis was subsequently charged with possession of a .357 magnum caliber Smith and Wesson model 686 revolver without a permit, contrary to N.J.S. 2C:39-5b; possession of a .38 caliber Smith and Wesson model 60 five shot revolver without a permit, contrary to the same statute; possession of five .38 caliber hollow point cartridges contained within a speed loader, contrary to N.J.S. 2C:39-3f; and with possession of an 18 inch long machete, contrary to N.J.S. 2C:39-3a. App. at 2a.

Before any proceedings were initiated, the Bergen County Prosecutor's Office consented to Mr. Sholtis' admission into the Pretrial Intervention Program (PTI)[2] since

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[2] N.J.S. 2C:43-12e provides, in pertinent part, that "[a]t any time prior to trial but after the filing of a criminal complaint . . . with the consent of the prosecutor and upon written recommenda-

Mr. Sholtis had no prior criminal record, conditioned upon his signing a weapons release form. App. at 2a. At the PTI hearing on September 13, 1988, Mr. Sholtis argued, however, that this condition would not be fair because his home state of Florida allowed him to carry a loaded firearm. As a result of Mr. Sholtis' concern, the trial court admitted Mr. Sholtis into the PTI program without the weapons release condition requested by the prosecutor's office, reserving decision on the return of the two seized firearms because of the trial court's concern that "there is comity problems here . . . ." App. at 10a. The trial court agreed with the prosecutor, however, that N.J.S. 2C:64-2 mandated forfeiture of the firearms without any additional proceedings. App. at 10a.

On March 21, 1989, defendant successfully completed PTI and all charges were dismissed, pursuant to N.J.S. 2C:43-13d. App. at 3a.

On April 27, 1990, the trial court rendered an oral opinion on the question on which he had earlier reserved judgment and ordered the State to return the two firearms to Mr. Sholtis through a Florida law enforcement agency.[3] App. at 3a. On July 10, 1990, the trial court formalized this ruling in a written order directing that the two firearms be returned to Mr. Sholtis through the auspices of the Sheriff of Lee County, Florida. The State appealed from this order to the Appellate Division. App. at 3a. On February 11, 1991, the Appellate Division affirmed, stating only that it affirmed substantially for the reasons set forth by the trial court. App. at 3a. Upon the State's application, the Appellate Division en-

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tion of the program director, the assignment judge or a judge designated by him may postpone all further proceedings against an applicant and refer said applicant to a program of supervisory treatment approved by the Supreme Court." See also, N.J.S. 2C:43-12a and New Jersey Supreme Court Rule 3:28.

[3] Mr. Sholtis did not seek return of the machete, the speed loader, or the cartridges.

tered a stay of the order directing the return of the two firearms, in order to permit the State to seek further review.

On May 16, 1991, the New Jersey Supreme Court granted the State's petition for certification under the caption "State v. Mark Joseph Sholtis." 126 N.J. 329, 598 A.2d 888 (N.J. 1991). On the State's subsequent motion, the caption was changed to "In the Matter of Two Seized Firearms" to reflect more accurately the nature of the proceedings.

On March 4, 1992, the New Jersey Supreme Court reversed the Appellate Division's affirmance. In the course of reversing the Appellate Division, the New Jersey Supreme Court expressly passed upon the question of whether Mr. Sholtis' right to procedural due process was violated when it held that "the proceedings in this case furnished sufficient procedural due process to the property owner . . . ." 127 N.J. at 90, 602 A.2d at 731. App. at 6a.[4] The New Jersey Supreme Court ruled on the question as the issue had been addressed by the State in its opening brief and by Mr. Sholtis in his answering brief.

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[4] The issue had been raised in the trial court in a letter memorandum from Mr. Sholtis' counsel to the trial court following the September 13, 1988 hearing on Mr. Sholtis' admission to the PTI program. App. at 10a. Since it was unnecessary to do so in light of their resolution of the case, the issue was not ruled on by the trial court or the Appellate Division.

REASON FOR GRANTING THE PETITION

THE DECISION OF THE SUPREME COURT OF NEW JERSEY IS IN DIRECT CONFLICT WITH A DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS AND NUMEROUS DECISIONS OF THIS COURT ON THE RIGHT TO PROCEDURAL DUE PROCESS OF LAW, IN THAT THE DECISION OF THE NEW JERSEY SUPREME COURT ORDERED FORFEITURE OF PROPERTY WITHOUT AFFORDING THE PROPERTY OWNER ADEQUATE NOTICE OR AN OPPORTUNITY FOR AN EVIDENTIARY HEARING

1) The only aspect of the decision of the New Jersey Supreme Court for which review is being sought in this Court is that court's holding that N.J.S. 2C:64-2, on its face and as applied to Mr. Sholtis, does not violate Mr. Sholtis' Fourteenth Amendment right to procedural due process.[5] According to the New Jersey Supreme Court, N.J.S. 2C:64-2 mandates that so-called "prima facie" contraband, including firearms under certain circumstances, be forfeited to the state upon "dismissal of the criminal proceeding" without application of the "civil procedures applicable to derivative contraband . . . ." 127 N.J. at 90, 602 A.2d at 730-1. App. at 6a. Pursuant to that plain statutory language, the New Jersey Supreme Court remanded this case to the trial court "for forfeiture of the contraband weapons . . . ." 127 N.J. at 90, 602 A.2d at 731. App. at 7a. No other proceedings were ordered or allowable under the New Jersey Supreme Court's decision.

2) In the context of the forfeiture of allegedly unlawfully possessed firearms, the District of Columbia Court of Appeals has unanimously ruled that a person who claims an interest in such property is

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[5] The New Jersey Supreme Court held that "the proceedings in this case furnished sufficient procedural due process" to Mr. Sholtis. 127 N.J. at 90, 602 A.2d at 731. App. at 6a.

> entitled to notice that certain property has been seized, that the District sought to retain the property pursuant to specified authority, and that a claimant could take particular steps to challenge the District's action. *Ford* v. *Turner*, 531 A.2d 233, 238 (D.C. App. 1987).

As a result, the District of Columbia Court of Appeals held in *Ford* that the plaintiff stated a cause of action for damages under 42 U.S.C. 1983 since the Metropolitan Police Department had effectively forfeited the plaintiff's property without constitutionally adequate notice; therefore, the cause was remanded to the trial court for a hearing on damages.

The decision in *Ford* was largely based upon this Court's holding in *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978) that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . ." See *Ford*, 531 A.2d at 240.

The District of Columbia Court of Appeals also based its holding upon this Court's long-held view that

> "(a)n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Memphis Light, Gas & Water Division* v. *Waters*, 436 U.S. 1, 13 (1978) (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

In mandating the forfeiture of firearms after *dismissal* of criminal proceedings, N.J.S. 2C:64-2 requires that firearms be forfeited without *any* notice—much less notice apprising the person from whom the firearms were seized of the legal authority pursuant to which the property is being retained and, more important, of the fact that the person "could take particular steps to

challenge" (*Ford*, 531 A.2d at 238) the State's action. In its opinion in the instant case, the New Jersey Supreme Court nonetheless held that "the proceedings in this case furnished sufficient procedural due process to the property owner . . . ." 127 N.J. at 90, 602 A.2d at 731. Yet plainly, "the proceedings in this case" (127 N.J. at 90, 602 A.2d at 731) did not notify Mr. Sholtis that he "could take particular steps to challenge" (*Ford*, 531 A.2d at 238) the State action. Indeed, the proceedings in this case made clear to Mr. Sholtis that he did not have an opportunity to challenge the State's action. As interpreted by the New Jersey Supreme Court, N.J.S. 2C:64-2 thus, at least in part, plainly contravenes the Due Process Clause of the Fourteenth Amendment as interpreted by the District of Columbia Court of Appeals and by this Court.[6]

3) In addition to not requiring constitutionally adequate notice, N.J.S. 2C:64-2 also fails to provide for an evidentiary hearing for firearms forfeitures after the dismissal of criminal proceedings. In the instant case, even though the question of the disposition of the firearms was discussed in the September 13, 1988 hearing in the trial court, that hearing focused on Mr. Sholtis' admission to the PTI program. As to the disposition of the firearms, the hearing dealt only with that question to the extent of the applicability of comity; the trial court prevented Mr. Sholtis from raising any other defenses to the forfeiture since it agreed with the State that N.J.S. 2C:64-2 mandated the forfeiture of the firearms upon dismissal of the criminal proceedings. App. at 3a, 10a. More-

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[6] The provision of N.J.S. 2C:64-2 which mandates forfeiture of firearms after entry of a judgment of conviction just as plainly does not violate due process since the criminal charge constitutes the required notice. See also N.J.S. 2C:64-3a, which, in the case of "non-*prima facie*" contraband, authorizes a civil action by the state, brought within 90 days, "against the property sought to be forfeited." In bringing such a civil action, all the pleading and service-of-process rules would apply; as a result, forfeiture pursuant to N.J.S. 2C:64-3a complies with the Due Process Clause.

over, as the New Jersey Supreme Court has ordered the trial court to forfeit the firearms (127 N.J. at 91, 602 A.2d at 731), notice and an opportunity for a hearing clearly remain foreclosed. Thus, the State did not afford Mr. Sholtis "an opportunity to present [his] objections." *Memphis Light, Gas & Water Division, supra* at 13.

As this Court has made clear, "some form of hearing is required before an individual is finally deprived of a property interest." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976).[7] Thus, since N.J.S. 2C:64-2, on its face and as applied to Mr. Sholtis, mandates forfeiture of Mr. Sholtis' firearms, and hence deprives him of his property with finality, N.J.S. 2C:64-2 denies Mr. Sholtis his right to procedural due process in not providing an evidentiary hearing on some form in which Mr. Sholtis could raise defenses to the forfeiture.

As noted in the Statement of the Case, *supra*, there exists a material factual dispute regarding the search which resulted in the seizure of Mr. Sholtis' firearms. Depending upon how that factual dispute would be resolved, the seizure of Mr. Sholtis' firearms could have been unlawful for one of two reasons: either it was the fruit of a compelled self-incriminating statement or the result of an unreasonable search. As a consequence, the firearms may not be admissible evidence. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (property seized pursuant to unreasonable, warrantless search not admissible evidence in forfeiture proceeding). See also *Florida* v. *Royer*, 460 U.S. 491 (1983) and *State* v. *Lund*, 119 N.J. 35 (1990). Without a hearing, however, none of these significant issues will ever be resolved.

4) It is no answer to the requirements of the Due Process Clause to argue, as the District of Columbia Court of Appeals clearly recognized in its analysis of the Dis-

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[7] As noted, *supra*, the procedures set forth in N.J.C. 2C:64-3, relating to so-called "non-*prima facie*" contraband, would certainly met the requirements of procedural due process.

trict of Columbia law in *Ford*, that forfeiture of firearms under certain circumstances—i.e., when the state designates them a "prima facie" contraband—occupies an unique position in forfeiture law; the clear language of the Due Process Clause allows of no exceptions. Indeed, such an assertion merely begs the question since the very issues in a forfeiture action would be 1) whether an item of property is in fact a "firearm" within the meaning of the applicable law [8] and 2) whether the firearm was unlawfully possessed, carried, or used. Moreover, as noted, *supra*, also at issue in a forfeiture action in this case would be whether the search of Mr. Sholtis' van was lawful. Without adequate notice and an opportunity for a hearing, the State's assertions remain merely unproven assertions and Mr. Sholtis' defenses remain merely theoretical.

5) In the words of the New Jersey Supreme Court, New Jersey is "one of the most heavily traveled corridor states in the nation . . . ." 127 N.J. at 89, 602 A.2d at 730. App. at 5a. Citizens of the New England states, as well as many of the states of the Atlantic Coast south of New Jersey, are thus likely to travel through New Jersey. And most of those states have not "constructed a 'grid' of regulations" (127 N.J. at 88, 602 A.2d at 730, App. at 4a) of firearms similar in scope and severity to those of New Jersey.[9] It thus follows that many citizens run the risk of being subjected to the application of N.J.S. 2C:64-2, as now interpreted by the New Jersey Supreme Court, and thus of losing valuable property which they lawfully possess, carry, and use in their states

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[8] This element would not be an issue in the instant case.

[9] With the exception of Massachusetts (Chap. 140, Laws of Mass.) and New York (Art. 265, N.Y. Consol. Laws (McKinney's)), none of the New England states or the Atlantic Coast States south of New Jersey have a requirement to have a permit to possess a firearm similar to N.J.S. 2C:39-5b. See, e.g., Ch. 790, Fl. Stat.; § 16-11-126 *et seq.*, Ga. Code; § 16-23-10 *et seq.*, Code of Laws of S.C.; § 14-402 *et seq.*, Gen. Stat. of N.C.; § 18-2.279 *et seq.*, Code of Va.; Art. 27, § 36 *et seq.* and § 441 *et seq.*; Code of Md; Title 11, § 1441

of residence.[10] It further follows that this case presents an issue of broad significance.

CONCLUSION

Because N.J.S. 2C:64-2, as interpreted by the New Jersey Supreme Court, plainly conflicts with the Due Process Clause as interpreted by the Court of Appeals of the District of Columbia and by this Court, this Court should grant this petition and resolve that conflict.

Respectfully submitted,

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May, 1992

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et seq., DE Code; Title 29, Ct. Gen. Stats.; Title 13, Ch. 85, Vt. Stat.; Ch. 159, NH Rev. Stat.; and Title 25, Ch. 252 ME Rev. Stat.

[10] Notably, like New Jersey, the District of Columbia is part of the "heavily traveled" Atlantic Coast corridor. Indeed, as the nation's capital, it attracts citizens from all states of the Union. Notwithstanding this fact, the District of Columbia Court of Appeals had no trouble applying the right to procedural due process in firearms forfeiture cases.

APPENDICES

APPENDIX A

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF TWO SEIZED FIREARMS

Argued Nov. 19, 1991

Decided March 4, 1992

Susan W. Sciacca, Asst. Prosecutor, for appellant State of N.J. (John J. Fahy, Bergen County Prosecutor, atty.).

Nancy E. Lucianna, Hackensack, for respondent Mark J. Sholtis (Lucianna & Lucianna, attys.; Athan M. Mergus, on the briefs).

Gary J. Needleman, Montville, submitted a brief on behalf of amici curiae Riverdale Police Pistol Team, Inc. and the Nat. Rifle Ass'n of America (Barbarula and Needleman, attys.).

The opinion of the Court was delivered by

O'HERN, J.

The question in this appeal is whether a non-resident gun owner may avoid the sanctions of New Jersey's gun-control laws on the basis that possession of the weapon was legal in the owner's state of residence and that the owner was merely transporting weapons through New Jersey without criminal intent and knowledge that New Jersey would regard the possession as illegal. In that context, we must inquire whether New Jersey must permit a motorist from Florida to carry, on the New Jersey Turnpike, a loaded handgun in a glove compartment because Florida would permit such possession on its highways. We find that no principle of constitutional doctrine

or of federal supremacy over the interstate transportation of weapons compels that result. New Jersey need not observe the lowest common denominator of gun control among the various states. It is illegal in New Jersey to transport a loaded handgun in this way without a license to carry. Firearms that are unlawfully possessed or carried in New Jersey are *prima facie* contraband under *N.J.S.A.* 2C:64-1 and are subject to forfeiture.

The parties have agreed on the facts. On August 9, 1988, State Police officers making a routine speeding stop of a Florida van on the New Jersey Turnpike spotted an eighteen-inch machete lying in open view between the driver and passenger seats. The troopers arrested the driver, Mark Sholtis (hereinafter referred to as defendant), and his passenger for possession of that dangerous weapon. Incident to the arrest, one of the troopers searched the interior of the stopped van. Inside the glove compartment he found a loaded .38 caliber Smith & Wesson handgun. Underneath and behind the driver's seat he discovered a loaded .357 magnum Smith & Wesson revolver, a speed loader containing five .38 caliber hollow-point cartridges, five .38 caliber blue-tipped cartridges, and a container of marijuana. The State Police subsequently charged defendant with illegal possession of the handguns, contrary to *N.J.S.A.* 2C:39-5b; of the hollow-point bullets, contrary to *N.J.S.A.* 2C:39-3f; and of the machete, contrary to *N.J.S.A.* 2C:39-3e. The passenger in defendant's van gave a written statement acknowledging ownership of the marijuana.

The Bergen County Prosecutor consented to defendant's admission into the Pre-Trial Intervention Program (PTI), see *Rule* 3:28, conditioned on his signing a weapons-release form. At the PTI hearing, defendant argued that that condition was unfair because his home state of Florida would allow him to carry loaded guns in his car. (The Bergen County Prosecutor's Office questioned whether, even under Florida law, defendant had legally transported

the loaded handguns, citing the requirements of *Fla.Stat.* 790.25(3)(1) and (5) that the firearm be "securely encased" or not otherwise "readily accessible for immediate use.") The Law Division admitted defendant into PTI but reserved decision on return of the two firearms. On defendant's successful completion of the PTI program, the Law Division dismissed all charges against him.

Thereafter, the Law Division ordered the State to return the two guns to Sholtis. The Law Division recognized that unlawfully possessed firearms are considered *prima facie* contraband under New Jersey's forfeiture statute, *N.J.S.A.* 2C:64-1 to -9. It concluded, however, that the statute does not apply in this case because of the property rights implicated and because principles of comity compelled deference to Florida law. The court thus ordered the return of the weapons to Sholtis under the auspices of Florida law-enforcement authorities to prevent illegal possession by Sholtis in New Jersey. The State appealed, and the Appellate Division affirmed *per curiam*. We granted the State's petition for certification, 126 *N.J.* 329, 598 *A.*2d 888 (1991), and now reverse.

But for consideration of whether New Jersey's gun control laws and forfeiture provisions are preempted by federal statute providing for the interstate transportation of firearms, 18 *U.S.C.A.* § 926A, all the issues presented in this case have been foreclosed by earlier decisions of this Court and the United States Supreme Court. In *State v. Hatch*, 64 *N.J.* 179, 313 *A.*2d 797 (1973), this Court disapproved of a trial court ruling that in the absence of notice or knowledge, a nonresident passing through New Jersey may possess a handgun or other firearm so long as that possession is not violative of the law of his or her own state. *Id.* at 188-89, 313 *A.*2d 797. The *Hatch* Court concluded that to carry handguns in one's car or on one's person along the highways is, apart from certain exemptions, "clearly forbidden unless the person carrying the handgun has a permit issued in accord-

ance with *N.J.S.A.* 2A:151-41, -44 (predecessor to *N.J.S.A.* 2C:58-4)." *Id.* at 186, 313 *A.*2d 797. The Court noted that "[w]hen dealing with the carrying of handguns we find nothing in the statute which suggests any flexibility or any intent to exclude nonresidents within or passing through New Jersey from the strict permit requirement." *Ibid.* Like Hatch, "when [Sholtis] came into New Jersey * * * he subjected himself to New Jersey's gun control regulations." *Id.* at 188, 313 *A.*2d 797.

New Jersey has carefully constructed a "grid" of regulations for handguns that differentiates between permission to possess a handgun and permission to carry a handgun. *State v. Ingram*, 98 *N.J.* 489, 495 n. 1, 488 *A.*2d 545 (1985). Few persons in this state are exempt from the criminal provisions for carrying a gun without a permit. *See N.J.S.A.* 2C:39-6. That the non-resident gun owner had no knowledge of the specifics of New Jersey's gun-control laws is of no moment. Gun-control laws are preeminently regulatory. *United States v. Freed*, 401 *U.S.* 601, 91 *S.Ct.* 1112, 28 *L.Ed.*2d 356 (1971). "[W]here dangerous or deleterious devices or products are involved, the probability of regulation is so great that anyone who is aware that he is either in possession of or dealing with them must be presumed to be aware of the regulation." *McIntosh v. Washington*, 395 *A.*2d 744, 756 (D.C.1978) (citing *United States v. International Minerals & Chem. Corp.*, 402 *U.S.* 558, 564, 91 *S.Ct.* 1697, 1701-02, 29 *L.Ed.*2d 178, 183 (1971). In the context of gun-control laws courts have held that ignorance of the law is no defense to even a statute requiring that the defendant have "knowingly" violated the law. *United States v. Sherbondy*, 865 *F.*2d 996, 1002 (9th Cir.1988).

The absence of a criminal conviction does not preclude forfeiture of the weapons. *See N.J.S.A.* 2C:64-4(b) ("The fact that a prosecution involving seized property terminates without a conviction does not preclude forfeiture proceedings against the property"); *United States*

v. One Assortment of 89 Firearms, 465 *U.S.* 354, 104 *S.Ct.* 1099, 79 *L.Ed.*2d 361 (1984) (criminal acquittal on dealing in firearms without a license did not bar subsequent civil forfeiture proceeding against weapons themselves under federal law). (In certain circumstances, however, 18 *U.S.C.A.* § 924(d)(1) now requires a criminal conviction as a condition to federal forfeiture of illegally-possessed firearms.)

Unlicensed firearms are subject to mandatory forfeiture in New Jersey, because as with illegally imported narcotics, *United States v. Jeffers*, 342 *U.S.* 48, 72 *S.Ct.* 93, 96 *L.Ed.* 59 (1951), and unregistered stills, alcohol, and mash, *Trupiano v. United States*, 334 *U.S.* 699, 68 *S.Ct.* 1229, 92 *L.Ed.* 1663 (1948), there is an express public policy against possession of such objects. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 *S.Ct.* 1246, 1250, 14 *L.Ed.*2d 170, 174 (1965) (distinguishing the imported narcotics and unregistered still, alcohol, and mash from an unlawfully-used automobile, the latter being only derivative contraband because but for its use it would be a thoroughly legal instrumentality).

As one of the most heavily traveled corridor states in the nation, New Jersey has a particularly compelling interest in regulating the carriage of weapons within its borders. New Jersey's forfeiture provisions further the purposes of gun-control legislation by "[k]eeping potentially dangerous weapons out of the hands of unlicensed [users]." *United States v. One Assortment of 89 Firearms, supra*, 465 *U.S.* at 364, 104 *S.Ct.* at 1106, 79 *L.Ed.*2d at 369; *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 *U.S.* 663, 687 n. 26, 94 *S.Ct.* 2080, 2094 n. 4, 40 *L.Ed.*2d 452, 470 (1974) ("Seizure and forfeiture statutes also help compensate the Government for its law enforcement efforts and provide methods for obtaining security for subsequently imposed penalties and fines.").

New Jersey denotes "firearms which are unlawfully possessed, carried, acquired or used" as "*prima facie* contraband," *N.J.S.A.* 2C:64-1a(1), but treats them as "per se" contraband. Such weapons are "subject to forfeiture and no property right shall exist in them." *Ibid.* The civil procedures applicable to derivative contraband, *State v. One 1986 Subaru*, 120 *N.J.* 310, 576 *A.*2d 859 (1990), do not apply to *prima facie* contraband. *N.J.S.A.* 2C:64-2 provides that

> *prima facie* contraband shall be retained by the State until entry of judgment or dismissal of the criminal proceeding, if any, arising out of the seizure. Thereafter, *prima facie* contraband shall be forfeited to the entity funding the prosecuting agency involved, subject to the rights of owners and others holding interests pursuant to section 2C:64-5.

The qualification in *N.J.S.A.* 2C:64-5 concerning the innocent involvement of property in unlawful activity does not apply to the illegal possession of weapons. All that is required is that the forfeiture proceedings meet constitutional requirements. *See N.J.S.A.* 2C:64-1b ("Seizure [of *prima facie* contraband] without such process (criminal or civil] may be made when not inconsistent with the Constitution of this State or the United States."). We are satisfied that the proceedings in this case furnished sufficient procedural due process to the property owner to assert any claim that the possession of the weapons was not illegal in New Jersey or any other cognizable claim to the property.

Thus, only the interdiction of 18 *U.S.C.A.* § 926A could prevent application of the State's forfeiture provision to defendant. That statute serves, however, as a two-edged sword in this case. Although enacted to assure to gun owners freedom to travel from state to state with weapons legally possessed in the state of residence, the statute qualifies that freedom with the sensible accommodation of each state's right to ensure the safety, health,

and welfare of its own citizens. To obtain the umbrella of federal protection set forth in 18 *U.S.C.A.* § 926A, the gun owner must be legally qualified to possess and carry the firearm, and must transport it unloaded, and neither the firearm nor any ammunition can be "readily accessible" or "directly accessible" from the passenger compartment of the vehicle. The statute provides further that "in the case of a vehicle without a compartment separate from the driver's compartment [as is the case here] the firearm or ammunition shall be contained in a locked container other than the glove compartment or console." 18 *U.S.C.A.* § 926A. *See also* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 *Cumb.L.Rev.* 585, 676-80 (1987) (discussion of historic and legal perspectives of the Act).

None of the conditions of the federal statute has been met here as both revolvers were "readily accessible" and loaded at the time that the State Police stopped defendant's van. Consequently, Sholtis had no federally-protected right under 18 *U.S.C.A.* § 926A to transport his loaded revolvers in the glove compartment and in the cab of the van. We are satisfied that the provisions of 18 *U.S.C.A.* § 926A sufficiently address the concerns for comity expressed by the courts below. No other principles of substantive due process or procedural fairness contravene the express language of *N.J.S.A.* 2C:64-1(a).

The judgment of the Appellate Division is reversed. The cause is remanded to the Law Division for forfeiture of the contraband weapons to the entity funding the prosecuting agency involved.

For reversal and remandment—Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—7.

Opposed—None.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

Complaint No. W-969 749, W-969 750

STATE OF NEW JERSEY

-vs-

MARK SHOLTIS

Defendant.

Date: September 13, 1988 PTI

Place: Bergen County Courthouse
Hackensack, New Jersey

BEFORE: THE HONORABLE ANDREW P. NAPOLITANO, J.S.C.

TRANSCRIPT OF
PRETRIAL
INTERVENTION
HEARING

APPEARANCES:

ROBERT WILSON, Assistant Prosecutor for the State of New Jersey

NANCY LUCIANNA, ESQ. Lucianna & Lucianna, Attorneys for the defendant Mark Sholtis

* * * *

[3] MS. LUCIANNA: There is no doubt about it, he is an outstanding citizen of Tallahassee, Florida. I ask you to look at these.

THE COURT: I'll hear you, Mr. Wilson, but you might want to take a minute, not now, because we have these other matters, but sometime this morning before we conclude the PTI that you look at these before you leave.

MR. WILSON: Your Honor, I just want to reinforce, and I'm sure you're well aware of the law on civil forfeitures and the criminal procedure that unlawful possession of a weapon in the State of New Jersey is contraband, per se, regardless of the fact that he may, in fact, have a firearm's permit in another state.

We're talking about the State of New Jersey and a violation of the state law of New Jersey, and in the event that this defendant breaks our law or wishes to get into the program, it's certainly reasonable, since the law itself under forfeiture says this is contraband, per se, to ask for a [4] weapons release, is really only a technicality, and to condition his entry into forfeiture of weapons, which are contraband, per se, does not seem to be an unreasonable request by the State and certainly should be a condition.

* * * *

[5] THE COURT: What are we talking about, Mr. Wilson? How many guns and what are they?

MR. WILSON: There was a .357 caliber revolver and also a .38 caliber Smith and Wesson revolver, both in his vehicle that he was driving through the State.

MS. LUCIANNA: Might add in his trunk.

THE COURT: I'm familiar with the facts here that he was asked by the police a question if he had weapons and he told them quite candidly that he did.

I'm also familiar with his background, you know, [6] pleasant, though much of the letters you were kind enough to have me sent—

MR. WILSON: Well, your Honor—

THE COURT: —to have sent to me.

Go ahead, Mr. Wilson.

MR. WILSON: As I say, the statute on forfeiture are clear on this issue that these things should be forfeited as a matter of law.

We would certainly be willing to supply the court with briefs and statements of the law, but we're really, in effect, saying if this defendant is willing to go on PIT, as we would if he was found guilty of this crime, that the law be followed, that the legislature in its wisdom has passed this law to deem these things contraband if seized, and that we follow the laws of the State of New Jersey and seize those and forfeit them.

THE COURT: Okay. I'm going to admit him in the program.

I'm going to ask you to send me a letter memorandum, not more than a page, Mr. Wilson, and, Miss Lucianna, you can respond to it, and I'll determine whether the condition for forfeiture will apply after I read your memorandum.

I think Mr. Wilson is essentially correct on the law, but there is comity problems here, comity as to whether the State of New Jersey should be seizing property which is lawful in the state of which the defendant is a resident and citizen.

[7] I think, perhaps, in a letter memorandum and I'll determine wether or not the condition should apply, okay.

MS. LUCIANNA: Thank you, your Honor.

THE COURT: Now, Mr. Sholtis, you are admitted to the program.

You'll find out from Miss Lucianna whether you get your guns back in a couple of weeks.

Mr. Wilson, maybe a week or two for your letter memrandum.

* * * *

(Whereupon the hearing concluded)

I certify that the foregoing transcript of proceedings is a true and accurate record of the proceedings.

/s/ Peter J. Rizza
PETER J. RIZZA,
C.S.R.
Lic. XI0744

Date: 10-4-90

Supreme Court, U.S.
FILED
JUN 30 1992
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(2)

No. 91-1921

In The

Supreme Court of the United States

October Term, 1991

MARK JOSEPH SHOLTIS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court, State of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a property claimant who has received actual notice of a proposed civil forfeiture of his illegally possessed firearms and who has defended against said forfeiture with the aid of counsel has been denied due process of law?

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STATUTES INVOLVED

N.J.S.A. 2C:64-2. Forfeiture procedures; prima facie contraband

Except as provided in N.J.S. 2C:35-21, prima facie contraband shall be retained by the state until entry of judgment or dismissal of the criminal proceeding, if any, arising out of the seizure. Thereafter, prima facie contraband shall be forfeited to the entity funding the prosecuting agency involved, subject to the rights of owners and others holding interests pursuant to section 2C:64-5.

N.J.S.A. 2C:64-5. Seized property; rights of owners and others holding interests

a. Does not apply.

b. Property seized under this chapter shall not be subject to forfeiture if the owner of the property establishes by a preponderance of the evidence that the owner was not involved in or aware of the unlawful activity and that the owner had done all that could reasonably be expected to prevent the proscribed use of the property by an agent. A person who uses or possesses property with the consent or knowledge of the owner is deemed to be the agent of the owner for purposes of this chapter.

c. Does not apply.

STATEMENT OF CASE

On August 9, 1988, Petitioner Mark Joseph Sholtis was stopped for speeding on the New Jersey Turnpike by two State Police troopers. Upon spotting an 18 inch long

machete lying in open view between the driver and passenger, the troopers arrested both individuals for possession of a dangerous weapon and then searched Sholtis's van incident to the arrest. Inside the glove compartment the officers found a loaded .38 caliber handgun; under the driver's seat, they found a loaded .357 magnum revolver, a speed loader containing hollow-point bullets, five cartridges, and a small quantity of marijuana. (A.2).

The petitioner was charged with illegal possession of the various weapons. He secured the services of a criminal defense attorney and made application to the Bergen County Pretrial Intervention Program, a diversionary program in which defendants are supervised by the Probation Department and, upon successful completion, have their charges dismissed. The Bergen County Prosecutor's Office consented to petitioner's participation in the program, but asked that the court order petitioner to sign a weapons release form as a pre-condition to acceptance. (A.2). The defense counsel strongly objected, arguing that since the petitioner could lawfully carry firearms in his home state of Florida, they should be returned to him. *Id*. The court reserved decision on the forfeiture of the firearms, but permitted the petitioner to enter the pretrial intervention program. (A.3). Briefs were requested by the court and duly filed by both parties.

A year and a half later, after the criminal charges had been dismissed, the trial court ruled that the guns must be returned to the petitioner. Although the court found that the State had perfected its application for forfeiture, it ruled against the State on the merits, based primarily on the fact that the petitioner lawfully possessed the firearms in Florida. (A.3).

The State appealed. The Appellate Division upheld the lower court's order, but the New Jersey Supreme Court reversed and ordered the guns forfeited to the State. (A.3).

SUMMARY OF ARGUMENT

The courts of New Jersey accord procedural due process to property claimants in civil forfeiture cases, even when the property is deemed to be contraband by statute. The present petitioner had actual notice, was represented by counsel at a hearing, filed a brief, had an opportunity to raise any issue he desired, and prevailed on the merits in the lower court and at the first appellate level.

ARGUMENT

POINT I

THE DEMANDS OF PROCEDURAL DUE PROCESS WERE FULLY SATISFIED BY THE NEW JERSEY COURTS

Petitioner Mark Joseph Sholtis seeks review based on what he characterizes as a lack of procedural due process in the New Jersey civil forfeiture statute. He maintains that he was deprived of his property without adequate notice or an opportunity to be heard. This contention is meritless, as a review of the procedural history will disclose.

The property in question, two loaded firearms, was seized from petitioner Sholtis at the time of his arrest for

possession of these (and other) weapons in his van. Having secured the services of counsel to defend him on the criminal charges, Sholtis applied for admission into a pretrial diversionary program. At the court hearing on this application, the State consented to the petitioner's acceptance, provided that he forfeit all weapons to the State by signing a release. The petitioner's counsel opposed this condition on the record, stating:

> "Your Honor, I would object to that one condition that he sign a weapons release. He is from the State of Florida. He's from Tallahassee. . . . And the state which allows him to carry a loaded gun is where he's from. I don't think it would be fair for him to sign a weapons release in this situation."[1]

The trial court thereupon ordered the program to accept Sholtis, but, based on defense counsel's arguments, reserved decision on the forfeiture until both sides had submitted briefs. Once briefing had occurred, the court ruled in the petitioner's favor, ordering the weapons returned to him. The State appealed first to the Appellate Division, where the property claimant prevailed, and then to the New Jersey Supreme Court, where the order was overturned.

Accordingly, in the course of the New Jersey proceedings, the property claimant had actual notice; was heard both orally and in writing, with no constraints placed on the issues he might have chosen to pursue; and

---

[1] Petitioner omitted this portion of the transcript from the appendix of his petition.

had representation by counsel throughout the proceedings.[2] Moreover, he prevailed on the merits in both lower courts and it was the State which had to seek further review.

Procedural due process mandates "some form of hearing . . . before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18 (1976). Due process " 'is not a technical conception with a fixed content' " but rather " 'is flexible and calls for such procedural protections as the particular situation demands.' " *Id.*, quoting from *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961) and *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d 484 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.*, citation omitted.

The State of New Jersey certainly does not dispute the proposition that procedural due process attaches to civil forfeiture cases. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-680, 94 S.Ct. 2080, 2090, 40 L.Ed. 2d 452 (1974). We part company from the present petitioner, however, when he focuses on purported procedural deficiencies in one portion of our forfeiture statute, rather than examining the whole statute or seeing how it works in practice. First, the petitioner has disregarded that portion of the statute which provides that *prima facie* contraband will only be forfeited subject to the

---

[2] Petitioner chose to proceed *pro se* in the Appellate Division, but was represented by his original counsel in the New Jersey Supreme Court.

rights of innocent owners. N.J.S.A. 2C:64-2 and N.J.S.A. 2C:64-5. Second, and even more important, the New Jersey Supreme Court has clearly articulated our state's approach to the due process issue:

> We note that a forfeiture statute need not provide for procedural due process. In this State, the judiciary itself has the constitutional power to provide for the demand of procedural due process, whatever they may be. *Farley v. $168,400.97*, 55 N.J. 31, 43n.5, 259 *A*.2d 201 (1969) [citation omitted].

This policy statement guides our approach to civil forfeiture cases; it also explains why the present case was surrounded by procedural protections even though the statute does not require the State to initiate a formal civil proceeding.

The present petitioner argues, however, that he never had an opportunity to challenge the search which led to the discovery of the firearms. This is clearly untrue. The petitioner was invited to write a brief at the trial level raising any issues he cared to raise. Had he argued that the weapons were illegally seized, he would have been given an opportunity to be heard, although his chances for success based on substantive law were rather dubious. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 3487, 81 L.Ed. 2d 778 (1984) and *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed. 2d 170 (1965) [Items such as the firearms involved herein are contraband *per se* – as opposed to derivative contraband – and are forfeited regardless of the exclusionary rule because their mere possession constitutes a crime.].

Based on all of the above, the State maintains that the present petitioner was given a full and fair opportunity to be heard by the courts of New Jersey and there is no reason to grant any further review.

CONCLUSION

For the reasons stated herein the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 91-1921

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARK JOSEPH SHOLTIS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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---

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In arguing that the procedures utilized by the trial court provided due process to the Petitioner, Mr. Mark Sholtis (hereinafter "Mr. Sholtis"), the Respondent State of New Jersey (hereinafter "the State") merely highlights the existence of a conflict between the decision of the New Jersey Supreme Court in the instant case and the District of Columbia Court of Appeals in *Ford* v. *Turner*, 531 A.2d 233 (1987), and the existence of a conflict between the decision of the New Jersey Supreme Court in the instant case

and the due process principles underlying decisions of this Court. Indeed, the State nowhere asserts that there is no conflict between the decision of the New Jersey Supreme Court in the instant case and the decision of the District of Columbia Court of Appeals in *Ford* v. *Turner*, *supra*. Thus, the State's contentions merely emphasize the desirability of this Court's granting Mr. Sholtis' petition.

REASONS FOR GRANTING THE PETITION

(1)

Because the Procedures Approved by the New Jersey Supreme Court Do Not Provide the Kind of Notice of Hearing that the District of Columbia Court of Appeals, in a Firearms Forfeiture Case, Required for Constitutional Adequacy, this Court Should Resolve That Conflict

The decision of the New Jersey Supreme Court in the instant case asserts that "the proceedings in this case furnished sufficient procedural due process to the property owner . . . ." 127 N.J. 84, 90, 602 A.2d 728, 731. In support thereof, the State argues that the "course of the . . . proceedings" in the trial court gave Mr. Sholtis "actual notice" of the forfeiture. Brief In Opposition To Petition For Writ of Certiorari (hereinafter "Opposition Brief") at 4. Thus, the State contends that the notice component of the Due Process Clause of the Fourteenth Amendment was satisfied in the instant case. But in *Ford* v. *Turner*, *supra*, 531 A.2d at 237, the District of Columbia Court of Appeals in 1987 expressly rejected "actual notice" as necessarily being sufficient to satisfy the requirements of due process, and unequivocally held that "actual notice . . . does not imply that [the property claimant] received constitutionally adequate notice." The District of Columbia Court of Appeals emphasized

that "actual notice" was insufficient to support a forfeiture of firearms because "in no respect was [the property claimant] informed of a particular statutory right to contest the government's retention of the seized items at a hearing . . . ." *Ford*, 531 A.2d at 238.

Mr. Sholtis agrees that the procedures utilized to forfeit property need not be established by statute but may be established by the judiciary, as the State argues it has done. Opposition Brief at 6. This does not, however, relieve the State of the duty to provide notice "that certain property has been seized, that [the State] sought to retain the property pursuant to specific authority, and that a claimant could take particular steps to challenge [the State's] action." *Ford*, 531 A.2d at 238. In other words, the State may not require a property claimant to guess at the timeliness and type of procedures available to avoid forfeiture of his property.

While the decision of the District of Columbia Court of Appeals is consistent with the principles underlying decisions of this Court, the decision of New Jersey Supreme Court in the instant case is not. For example, in considering the constitutionality of notice given to a welfare recipient upon termination of welfare benefits, this Court approved the adequacy of the notice only because the recipient was "told the legal and factual bases for the [Welfare] Department's doubts." *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970). Thus, not only does there exist an unmistakable conflict between the decision of the New Jersey Supreme Court and that of the District of Columbia Court of Appeals on the question of what constitutes constitutional adequacy of notice, but there also exists a

conflict between the decision of the New Jersey Supreme Court and a decision of this Court on the same constitutional question.

(2)

Because the Procedures Approved by the New Jersey Supreme Court Do Not Provide the Kind of Hearing that the Principles Underlying This Court's Decisions Require For Constitutional Adequacy, This Court Should Settle This Important Question of Federal Constitutional Law

Although the State does not dispute the fact that the actual hearing in the trial court was held for the sole purpose of considering Mr. Sholtis' application for admission into New Jersey's Pre-Trial Intervention (hereinafter "PTI") program (Opposition Brief at 4), the State asserts that this hearing was a constitutionally adequate substitute for a forfeiture hearing because Mr. Sholtis "was heard both orally and in writing, with no constraints placed on the issues he might have chosen to pursue; and had representation by counsel throughout the proceedings." Opposition Brief at 4-5. In the same vein, the State also asserts that Mr. Sholtis "was invited to write a brief at the trial level raising any issues he cared to raise." Opposition Brief at 6. However, because the hearing was for the sole purpose of determining whether Mr. Sholtis should be admitted into the PTI program, the only action taken at the hearing by the trial court regarding forfeiture of the firearms was to reserve decision on whether Mr. Sholtis' signing of the firearms release should be a condition of his admission into the PTI program, an action taken only because of the trial court's expressed concern for the "comity problems here . . . ." Appendix at 10a. The trial court otherwise agreed with the State that New Jersey law

mandated forfeiture without any additional proceedings. Appendix at 10a. As a consequence, no testimony was presented by the State or by Mr. Sholtis, and the actual brief-writing invitation by the trial court was to submit a brief solely on the "comity problems here . . . ." Appendix at 10a. Never in the context of any forfeiture procedures was Mr. Sholtis invited to contest any issues of fact for the purpose of avoiding the impending forfeiture.[1]

The general constitutionally required due process standard for hearings involving final deprivation of property rights is that they must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). In expanding upon the "meaningful manner" principle, this Court has held, in the context of termination of welfare benefits, that this principle requires that a person whose benefits are to be terminated is akin to a property claimant and as such must be provided with "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg*, 397 U.S. at 267-8. Moreover, "this Court [has] voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may *defend*,' *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876)." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971) (emphasis added). Plainly, one can "defend"

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[1] As the District of Columbia Court of Appeals in *Ford* v. *Turner*, *supra*, did not reach the issue of what procedures, in addition to adequate notice, were required for a constitutionally adequate hearing, *Ford*, 531 A.2d at 244, the remaining portion of this brief will focus only on the conflict between the decision of the New Jersey Supreme Court in the instant case and decisions of this Court.

only if one is a party-defendant (or respondent) and allegations are made, and proof is presented, by a party-plaintiff (or petitioner).

In the context of a property forfeiture, this Court has held that "a forfeiture proceeding is quasi-criminal in character." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). It logically follows that a forfeiture proceeding must be conducted in a manner similar to a criminal proceeding; i.e., the State must *initiate* a formal proceeding specifically for the purpose of forfeiture[2] at which it bears the burden of proof, a burden in which the degree of proof may admittedly be less than "beyond a reasonable doubt." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984). Indeed, it has been the continuing underlying assumption of this Court's forfeiture jurisprudence that, to forfeit property, a proceeding similar in form to a criminal proceeding is the historically established norm. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974) (reviewing historical development of substantive and procedural forfeiture law).

In view of the constitutional due process principles established by this Court's decisions, it is evident that the severely truncated process approved of by the New Jersey Supreme Court does not comport with those principles, even assuming *arguendo* that no constraints on the process for avoiding forfeiture had been placed on Mr. Sholtis and that *he* could have

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[2] In *One 1958 Plymouth Sedan*, for example, the Commonwealth, pursuant to state statute, filed separate petitions for forfeiture of an automobile and of liquor. 380 U.S. at 694, n. 3.

raised any issues he wished. As a consequence, this case presents an important question of federal constitutional law to which the decisions of this Court, while establishing underlying principles, have not directly spoken—namely, the standards of procedural adequacy governing property forfeiture hearings. Thus, it is desirable for this Court to settle this question by determining the important issue of what "manner" of hearing is "meaningful" in the context of property forfeiture.

This case presents an appropriate opportunity for this Court to address that question—since the New Jersey Supreme Court approved, as being constitutionally adequate, a hearing in which no specific allegations regarding the forfeiture were made by the State and no evidence, let alone witnesses, was presented by the State to support those allegations.

CONCLUSION

Because a forfeiture of property implicates a fundamental constitutional right, this Court should grant Mr. Sholtis' petition, in order to resolve the evident conflict between the decision of the New Jersey Supreme Court in the instant case and the decision of the District of Columbia Court of Appeals in *Ford* v. *Turner*, *supra*, and to resolve the evident conflict between the decision of the New Jersey Supreme Court in the instant case and the due process principles underlying this Court's decisions, and thus to settle important questions of federal constitutional law.

Respectfully submitted,

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